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In The  
**Supreme Court of the United States**  
October Term, 1989

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YALE LUBMAN, THOMAS J. MURPHY,  
JOHN S. SEISS, and JOSEPH STEWART,

*Petitioners,*

v.

MAYOR and CITY COUNCIL OF  
BALTIMORE CITY,

*Respondents.*

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**Petition For A Writ Of Certiorari  
To The Maryland Court Of Appeals**

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**AMICUS CURIAE BRIEF  
OF ROBERT F. CARLSON**

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**INTERESTS OF AMICUS CURIAE**

Pursuant to Supreme Court Rule 36, Robert F. Carlson, a member and past president of the Board of Administration of the California Public Employees' Retirement System (PERS) and an attorney admitted to practice before this Court and a member of the California State Bar, acting on his own

behalf, pro se, respectfully submits this brief amicus curiae in support of petitioners, Yale Lubman, Thomas J. Murphy, John S. Seiss, and Joseph Stewart and their petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the written consents have been lodged with the Clerk of the Court.

Amicus, Robert F. Carlson, is Adjunct Professor of Law, University of the Pacific, McGeorge College of Law, and currently is and has been an elected member of the governing board of PERS since 1971, and was president of the board from 1975 to 1985. In addition, he is a member of the boards of directors of various public benefit corporations and the Franklin Group AGE Mutual Fund administering assets of over \$2 billion.

Effective January 1, 1987, the California State Legislature passed legislation directing that all state trust funds including funds administered by PERS be divested of "investments in business firms with business operations in South Africa or business arrangements with the government of South Africa, and in financial institutions making or increasing loans or other extensions of credit to the government of South Africa or any South African corporation." Cal. Gov't Code § 16644. Effective January 1, 1991, state trust funds shall not hold any investments in any business firm with operations in South Africa or business arrangements with the government of South Africa. Gov't Code § 16645.

The PERS board is responsible for administering the largest public retirement fund in the nation. It currently administers \$56 billion in investments that are subject to the legislative divestment required by Government Code §§ 16640-16649. This includes funds supporting the State of California Public Employees' Retirement System, the California Judges' Retirement System, and the Legislators' Retirement System. It also administers under contract retirement funds of numerous California cities, counties, and local agencies also



subject to the divestment statute.

Divestiture mandated by the state legislature has resulted in reduced total return to the retirement systems administered by PERS and has resulted in increased administration costs associated with the sale of divested securities and the purchase of replacement investments.

As reported to the PERS board by its chief investment officer, the Public Employees' and Legislators' Retirement Systems have experienced the loss of potential total returns through September 30, 1989, of 1.21% annually or approximately \$167,000,000 per year. Additional brokerage and other charges associated with divestment and the purchase of alternative investments have been incurred by PERS.

As of December 31, 1987, prior to the effective date of the statute, the Public Employees' Retirement System held a total market value of \$3,525,037,207 invested in firms with business connections in South Africa requiring divestiture. This represented 8.42% of the total investment portfolio as of that date.

Amicus urges this Court to review the opinion of the Maryland Court of Appeals which upheld the validity of a divestment ordinance enacted by the City of Baltimore which is very similar to the legislation enacted by the California Legislature. Only by review of this Court can other states, cities, trustees, directors, fiduciaries, beneficiaries, and participating employers determine whether the actions mandated by legislative bodies, other than the Congress, requiring divestiture of investments in businesses associated with South Africa are consistent with the requirements of the United States Constitution and federal law.

As a member of the board of PERS, amicus herein has a personal, real, and fiduciary interest in having this Court review the decision below. This is particularly true since it appears that the divestiture policies being applied by the City of Baltimore, by California, and other states and local entities

have been preempted by federal law and contravene several provisions of the United States Constitution.

As a member of the PERS Board of Administration amicus has a fiduciary responsibility, as do the City of Baltimore trustees, to comply with prudent investment standards and maximize returns to the beneficiaries. The California Constitution, Article XVI, § 17, sets forth those standards for any public pension or retirement system as follows:

"(b) The fiduciary of the public pension or retirement system shall discharge his or her duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system.

"(c) The fiduciary of the public pension or retirement system shall discharge his or her duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.

"(d) The fiduciary of the public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly prudent not to do so."

### **STATEMENT OF THE CASE**

This case very simply involves the validity of an ordinance of the City of Baltimore mandating divestment and prohibiting future investment of retirement system funds, which ultimately inure to the benefit of the retiree-beneficiaries, in any

company doing business in or with South Africa. This is very similar to divestiture statutes and ordinances recently enacted by other cities and states, including the State of California, in reaction to the outrageous apartheid system that exists in South Africa.

## **REASONS FOR GRANTING CERTIORARI**

### **I**

## **THIS CASE PRESENTS IMPORTANT ISSUES OF LAW THAT ONLY THIS COURT CAN RESOLVE**

### **A. Introduction**

Shortly after the enactment of the California legislation an article was published in the University of the Pacific, McGeorge School of Law, Pacific Law Journal entitled "Challenges to the Constitutionality of the California Divestment Statute," 19 Pac. L. J. 217 (1987) (Pacific Law Journal article). This comprehensive article analyzed the California statute in great detail. It unequivocally concludes that such legislation is constitutionally invalid and preempted by federal action.

### **B. Federal Preemption**

With the enactment of the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 2151, 2346(a), 5001-5116 Congress has expressly or at least impliedly occupied the entire field of regulation regarding apartheid. The Federal Anti-Apartheid Act does not contain an express preemption provision, but since the Baltimore ordinance in restricting new investments in South Africa is in direct conflict with the federal Act and is inconsistent with the objectives of the federal statute the ordinance is preempted, as is any similar ordinance or statute. Rice v. Santa Fe Elevators, 331 U.S. 218 (1947). Due to the

comprehensive character of the federal Act and the fact that the conduct of foreign affairs is a dominant federal interest the Court may infer an intent by Congress to preempt state action. Pacific Law Journal at 223-29.

Also in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), federal preemption over noise regulation at airports was inferred from the Federal Aviation Act in the regulation of air space. This was largely based on the provision in the Act expressing an interest in protecting persons on the ground as well in controlling the use of the airspace and precluded more restrictive local noise requirements. Likewise here, the Comprehensive Anti-Apartheid Act precludes more restrictive local divestment requirements.

### **1. The Commerce Clause**

The Baltimore ordinance necessarily affects both interstate and foreign commerce. The only question is whether the ordinance comes within an exception. The Baltimore court determined that such an exception exists. However as stated in the Pacific Law Journal article at 230-31 neither moral outrage nor protection of funds falls within an exception:

"The primary purpose of [the legislation] is to condemn and to attempt to eliminate the system of apartheid. Traditionally, legitimate purposes for commerce clause analysis have been limited to the protection of health, safety, and financial prosperity of the people and industries of the State. Expression of moral outrage has never been found by the courts to constitute a legitimate purpose. ... A second purpose behind [the legislation] is the protection of the investment of trust funds. ... This may be a plausible purpose, if the businesses depended upon their South

African connection for their continued viability. ... Since no legitimate local benefit is furthered by the legislation, any imposition on interstate commerce would be a violation of the commerce clause."

Nor does the narrow "market participant" exception appear applicable. The state may be viewed as a "private trader" in securities, but South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984), held that the "market" must be narrowly defined. Any attempt to impose conditions outside the participant's market will be regulatory action and not as a market participant. To be a market participant Baltimore would need to be the issuer of securities rather than acting as a buyer or seller.

In addition, it is obvious that divestment was not enacted primarily to benefit local residents. Instead its purpose was regulatory in nature designed to provide economic coercion on South Africa as a means toward dismantling apartheid.

In any event it appears from language in South-Central that the market participant doctrine will not apply in regard to foreign commerce.

## **2. Foreign Commerce and Foreign Policy**

The Constitution clearly vests the federal government with exclusive authority over foreign commerce and foreign policy. Only the Congress has power to "regulate commerce with foreign nations." Art. I, § 8(4).

This Court has previously protected the exclusive nature of the federal government in the area of foreign relations. In Hines v. Davidowitz, 312 U.S. 52 (1941), this Court invalidated a Pennsylvania statute requiring adult aliens to register annually with the state:

"The Federal Government, representing as it does the

collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. ... Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Id. at 63.

Similarly, in Zschernig v. Miller, 389 U.S. 429 (1968), this Court invalidated an Oregon statute which conditioned the claim of a nonresident alien to real property on the recognition in the foreign country of a reciprocal right of a United States citizen to take property on the same terms as a citizen of that country. This cold war effort involved the state in "foreign affairs and international relations--matters which the Constitution entrusts solely to the Federal Government." Id. at 436.

## II

### **ONLY THE SUPREME COURT CAN PROVIDE FIDUCIARIES WITH THE NEEDED ANSWER ON THE CONSTITUTIONALITY OF DIVESTITURE**

As detailed in the Petition for Writ of Certiorari (Pages 8-10) many states and cities are enacting divestment statutes in reaction to various social policies that impact foreign policy and foreign commerce. These include reaction to the treatment of Catholics in Northern Ireland, students in the People's Republic of China, "nuclear free zones" as well as apartheid in South Africa and a lack of "human rights" in the Union of Soviet Socialist Republics.

Trustees responsible for administering the hundreds of billions of dollars of assets in employee pension funds have fiduciary responsibilities to act in the sole interest of the

beneficiaries and participants in the fund and to maximize returns with care, skill, prudence, and diligence. Divestiture statutes conflict directly with these principles and should not be followed if they are invalid.

The Maryland decision is in conflict with decisions of other states such as Illinois, New York, and Michigan. See Springfield Rare Coin Galleries, Inc. v. Johns, 115 Ill. 2d 221, 503 N.E.2d 300 (1986); New York Times Company v. City of New York Commission on Human Rights, 41 N.Y.2d 345, 361 N.E.2d 963 (1977); and Regents of the University of Michigan v. State of Michigan, 166 Mich. App. 314, 419 N.W.2d 773 (1988). In the Michigan case the Court of Appeals invalidated a statute precluding investment of university funds in organizations doing business in the Republic of South Africa or the Union of Soviet Socialist Republics.

Until this Court answers the constitutional issues raised by the Maryland decision fiduciaries such as amicus will have no way of knowing whether or not they are violating their fiduciary responsibilities in applying the divestiture policies dictated by local and state governments. Apparently the plaintiff trustees of the City of Baltimore Employees' Retirement System are content to rely on a decision from their state's highest court. Fiduciaries in other states do not enjoy that same comfort. Until this issue has been resolved finally one way or another fiduciaries, beneficiaries, and other participants in employee pension funds will be without guidance. And only this Court is in a position to provide that final and definitive answer.

The Maryland High Court itself recognized the great importance of these federal and constitutional issues for review by this Court in granting petitioners' (beneficiaries') right of intervention. This was to insure that review of a decision adverse to the Baltimore trustees would not be foreclosed: "The prospect that the Trustees might not ask the United States Supreme Court to review an unfavorable ruling in the



Court is not entirely unlikely in light of past events. A decision not to seek Supreme Court review would adversely affect the [beneficiary] applicants, who would be bound by our ruling." Petitioners' Appendix, Exhibit D, Page 17.

### CONCLUSION

This case presents issues of major importance which should be resolved by this Court. Resolution is important not only to the beneficiaries of Baltimore's retirement system. The members and beneficiaries of retirement systems throughout the country are impacted by similar laws.

One may readily sympathize with those communities which desire to exert pressure upon South Africa's uncivilized apartheid policies. But locally adopted divestiture ordinances intrude on areas of national interest. There are also high costs associated with this voicing of outrage in the manner chosen by Baltimore--costs that are borne, not by the citizens of the community taking the action, but instead by the beneficiaries of the retirement system. Serious questions are thus raised as to whether these beneficiaries alone can be asked to absorb these costs. Guidance is urgently needed on this issue of great national importance.

It is respectfully submitted that the Petition for Certiorari be granted.

DATED: January, 1990.

Respectfully submitted,

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